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Nos. 00-878 and 00-92

Supreme Court
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IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

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Rule 29.6 STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC state as follows:

WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.), and MCImetro Access Transmission Services LLC are all wholly owned subsidiaries, directly or indirectly, of WorldCom, Inc. WorldCom, Inc. is a Georgia corporation that is publicly traded on the NASDAQ National Market under the symbol WCOM. No publicly held company owns 10 percent or more of WorldCom, Inc. stock.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Focal Communications Corp. states as follows:

Focal Communications Corporation, through its operating subsidiaries, provides local exchange telecommunications services, including telecommunications services to Internet service providers. Focal Communications Corporation is a Delaware corporation that is publicly traded on the NASDAQ National Market under the symbol FCOM. No publicly held company owns 10 percent or more of the stock of Focal Communications Corporation. There are no subsidiaries or affiliates of Focal Communications Corporation that have issued equity or debt securities to the public.

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STATEMENT

Respondents WorldCom Technologies, Inc. ("WorldCom"), MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services, Inc., and Focal Communications Corporation (collectively the "Carriers") submit this brief in opposition to the petitions for certiorari filed by the members of the Illinois Commerce Commission (referred to collectively with the Commission as "ICC") and Illinois Bell Telephone Company ("Ameritech"). Those petitions attack the same Seventh Circuit ruling from diametrically opposed points of view. As we show, the Seventh Circuit adopted a correct intermediate position that is not in conflict with any decision of any other circuit and does not warrant review by this Court.

1. Statutory Scheme

Ameritech filed this case in federal court seeking review of the ICC's order enforcing "interconnection agreements" that the Carriers and Ameritech had entered into as provided in the Telecommunications Act of 1996 (the "Act" or "1996 Act"). [1] Such agreements are a key feature of the system set up by the 1996 Act to promote competition in the local telephone market by requiring each incumbent local telephone company, such as Ameritech, to interconnect and "share its network with competitors." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); *see* 47 U.S.C. § 251(c)(2)(A). Under the Act, new entrants and incumbents first attempt to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If they cannot

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[1] At the same time it filed in the district court, Ameritech also filed a parallel action in the Illinois Appellate Court. The Illinois Appellate Court stayed that action at Ameritech's request pending resolution of this case. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 3-98-0393, Order Granting Stay (Ill. App. Ct. June 17, 1998). The stay remains in effect.

agree, the governing state commission is authorized, but not required, to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). The results of the negotiation and arbitration process are memorialized in an interconnection agreement, which must be submitted for approval to the state commission. *Id.* § 252(e).

Although the Act supplies minimum requirements that govern arbitrated provisions, parties may negotiate terms "without regard" to them. *Id.* § 252(a)(1). When parties voluntarily agree to terms, a state commission may reject the agreement only if it is discriminatory or against the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A); *see also AT&T Corp.*, 525 U.S. at 371-73.

Through this statutory scheme, Congress altered the balance between federal and state authority in the area of local telecommunications competition. The 1996 Act partially supplants the existing system of exclusive state regulation, and imposes a new set of federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *See* 525 U.S. at 371-73. Congress vested the Federal Communications Commission ("FCC") with authority to implement the federal standards created by the Act. *Id.* at 377-84 & n.5; 47 U.S.C. § 201(b). But Congress also carved out a new, voluntary role for state commissions that choose to oversee interconnection agreements. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If a state commission elects to

participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6). If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *Id.*; *see* 28 U.S.C. § 2342(1).

2. Nature of the Dispute

This case concerns "reciprocal compensation," which is the payment that a local carrier receives for completing a call for another local carrier. With local competition, customers of one local carrier will call customers of another. Carriers must therefore assist each other in delivering calls. When a customer of one carrier makes a local call to a customer of another, only the caller pays its carrier for the telephone services, leaving the other carrier uncompensated. The caller's local carrier therefore must compensate the other carrier whose facilities are used to complete the call. *See* 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701; Am. Pet. App. 3a.

The specific issue in this case is the proper treatment of calls by customers of the Carriers and Ameritech to other local customers operating as "Internet Service Providers" (ISPs). These calls are treated for purposes of billing customers like any other local call. Am. Pet. App. 4a. Ameritech and the Carriers also routinely charged each other reciprocal compensation for terminating ISP calls placed by each others' customers. *Id.* at 82a-83a. In July 1997, however, Ameritech announced that it was unilaterally stopping reciprocal compensation payments for calls to local ISPs, claiming for the first time that such calls are not "Local Traffic." *Id.* at 4a. In response, the Carriers asked the ICC to enforce the agreements

by requiring Ameritech to resume payments of reciprocal compensation for ISP calls. *Id.* at 4a-5a. The ICC held an evidentiary hearing on November 21, 1997. *Id.* at 65a. On March 11, 1998, the ICC ruled that the plain language of the agreements, industry custom and practice, and Ameritech's own conduct mandated payment of reciprocal compensation for calls to ISPs. *Id.* at 5a, 76a-83a.

3. District Court Proceedings

On March 27, 1998, Ameritech filed suit in the district court under section 252(e)(6) against the Carriers and the ICC challenging the ICC's determination. Ameritech alleged that the ICC's interpretation of the interconnection agreements violated federal law, arguing that the FCC had determined as a matter of federal law that calls to ISPs are not local. After briefing by the parties, the court rejected the ICC's arguments that the court lacked jurisdiction and that the ICC was immune from suit under the Eleventh Amendment. *Id.* at 52a. But the court ruled against Ameritech on the merits, holding that the ICC's interpretation of the agreements did not violate federal law. *Id.* at 49a, 50a.

4. The Seventh Circuit's Decision

Ameritech and the ICC appealed to the Seventh Circuit. The court of appeals rejected the ICC's immunity claim based on its prior decision in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999) ("*MCI-I*"), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000) ("*MCI-II*"), *petition for certiorari filed*, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (Nos. 00-653, 00-744). Am. Pet. App. 6a. Reviewing the text of section 252(e)(6), the court also rejected the ICC's jurisdictional argument and found that "Congress

envisioned suits reviewing 'actions' by state commissions" for compliance with sections 251 and 252 of the Act. *Id.* at 8a.

But the Seventh Circuit also determined that a federal court's scope of review under section 252(e)(6) is limited. Because the plain text of section 252(e)(6) confines review to the question of compliance with sections 251 and 252, the court held that a court's task under section 252(e)(6) is "to examine the [state commission's] order, not to determine whether the [commission] correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation." *Id.* at 11a. Thus, the Seventh Circuit explained, section 252(e)(6) provided no basis for the court to "review [the ICC's] actions for compliance with state law." *Id.* at 8a. Accordingly, the Seventh Circuit found that Ameritech's appeal presented a "narrow issue on the merits: whether a decision of the [ICC] regarding reciprocal compensation for telephone connections to [ISPs] violates federal law." *Id.* at 2a. Reviewing the Act and the relevant FCC precedent, the Seventh Circuit concluded that "nothing in what the ICC said violates federal law in existence at this time." *Id.* at 15a.

Both Ameritech and the ICC filed rehearing petitions, raising essentially the same issues they raise here. In an initial response to Ameritech's petition, the Seventh Circuit amended its decision on August 18, 1999. It added language stating that "[s]ection 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision 'interpreting' an agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Id.* at 17a.

The rehearing petitions were held in abeyance for about a year, pending the Seventh Circuit's reconsideration of its Eleventh Amendment ruling in *MCI-I*. The Seventh Circuit ultimately issued a revised opinion in *MCI-II* reaffirming its ruling that state commissions do not have Eleventh Amendment immunity in actions brought under section 252 of the Act. It then denied the rehearing petitions in the instant case on August 9, 2000. *Id.* at 18a-19a.

REASONS FOR DENYING THE PETITIONS

The issues raised by the petitioners do not warrant this Court's review for three reasons.

First, there is no genuine division among the circuits as to any of the issues raised by the petitioners. Four circuits (the Fifth, Seventh, Eighth, and Tenth) have all held that a federal court does have jurisdiction under section 252(e)(6) to consider whether a state commission violated federal law in a ruling *enforcing* a previously approved interconnection agreement. At least three (the Fifth, Seventh, and Tenth) have agreed that a claim like Ameritech's in this case – that a state commission's enforcement order was based on a misinterpretation of the language of an interconnection agreement – raises issues of *state* law. Contrary to Ameritech's argument, no other circuit disagrees. Finally, as to the Eleventh Amendment issue raised by the ICC, all three circuits to have addressed the issue (the Sixth, Seventh, and Tenth) have held that state commissions are not immune from federal lawsuits brought under section 252(e)(6) claiming that the state commission violated federal law.

Second, even if there were "disarray" in the decisions of the circuits in this area, it would still make sense to defer

addressing the issues raised by the petitions. Those same issues are presented in cases currently pending in the Fourth, Sixth, and Eleventh Circuits. At the same time, relevant issues concerning reciprocal compensation for calls to ISPs are reportedly the subject of impending federal agency and potential legislative action, either of which could substantially limit the precedential value of any decision this Court might issue. There is no compelling reason for this Court to grant certiorari now when these issues are still making their way through all three branches of government. Ameritech will suffer no prejudice from having to pursue its existing contract claim in state court.

Third, the Seventh Circuit correctly resolved each of the issues raised by petitioners. There is no reason to think that Congress gave the federal courts *exclusive* jurisdiction over cases challenging state commission decisions to approve or reject interconnection agreements, *see* 47 U.S.C. § 252(e)(4), but denied the same courts the authority to review state commission enforcement actions for compliance with federal law. On the other hand, the Seventh Circuit appropriately recognized that a challenge to a state commission's interpretation of the language of an interconnection agreement raises issues of state law. Indeed, this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 22-23 (1982), compels that conclusion. Finally, the Seventh Circuit broke no new ground in applying the doctrines of waiver and *Ex parte Young* to preclude the ICC from invoking Eleventh Amendment immunity as to the purely federal claims Ameritech raised, and the Seventh Circuit resolved.

I. There Is No Genuine Circuit Split on Any of the Issues the Petitioners Raise.

A. The circuits agree that section 252(e)(6) applies to review of "enforcement decisions."

The ICC asserts that this Court's review is necessary to correct the Seventh Circuit's purportedly incorrect conclusion that section 252(e)(6) of the 1996 Act extends to review of state commission decisions interpreting or enforcing interconnection agreements. ICC Pet. at 12-18. The ICC argues that section 252(e)(6) only confers federal jurisdiction to review state commission determinations approving or rejecting interconnection agreements. *Id.*

No circuit split exists on this issue. Three other circuits have considered this very issue in practically identical cases and have agreed with the Seventh Circuit's conclusion that section 252(e)(6) confers jurisdiction to review state commission determinations in the "enforcement" stage as well as the "approval" stage. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, No. 99-5222, ___ F.3d ___, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Pub. Utils. Comm'n of Tex.*, 208 F.3d 475, 480 (5th Cir. 2000). No circuit has ruled to the contrary.

B. The circuits agree that interpretation of an interconnection agreement is primarily a question of state law.

Taking a view directly opposite that of the ICC, Ameritech contends that *all* questions relating to the interpretation and enforcement of an interconnection agreement are federal

questions cognizable in federal court pursuant to section 252(e)(6). But here again there is no circuit split on this issue. Ameritech's fundamental claim is that federal law governs all aspects of the question of "[w]hether a . . . state commission determination concerning the rights and obligations of the parties to a section 252 agreement deviated from the plain terms of the agreement." Am. Pet. at i. In addition to the Seventh Circuit, both the Tenth and the Fifth Circuits have rejected that argument in nearly identical cases. *Brooks Fiber*, 2000 WL 1827576, at *4; *Southwestern Bell*, 208 F.3d at 485; *see also Puerto Rico Tel. Co. v. Telecommunications Regulatory Board of Puerto Rico*, 189 F.3d 13 (1st Cir. 1999). No circuit has ruled otherwise.

Ameritech attempts to establish a circuit split by pointing to a different aspect of the Fifth Circuit's ruling – its authorization of federal court review of *state* law claims. Am. Pet. at 13, 17-19.[2] But even if that purported circuit split existed, it would have no relevance to this case, where Ameritech has consistently argued that it can pursue its claim of misinterpretation of the agreement in federal court because it is a *federal* claim. The Fifth Circuit itself expressly *rejected* that argument. *Southwestern Bell*, 208 F.3d at 484.

Nor is there a genuine conflict among the circuits even as to the question whether a federal court can entertain state law

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[2] The Fifth Circuit mistakenly read two cases, *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), and *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999), to support its conclusion that federal courts may review questions of state law. In fact, neither case considered any issue of state law, but held only that federal courts should consider questions of federal law de novo and factual determinations under an arbitrary and capricious standard. *US West*, 193 F.3d at 1117; *GTE South*, 199 F.3d at 745.

challenges to a commission's order enforcing an interconnection agreement. As the Tenth Circuit recently explained, the Fifth Circuit is properly understood as having endorsed the exercise of supplemental jurisdiction under 28 U.S.C. § 1367 to reach the state law claims. *Brooks Fiber*, 2000 WL 1827576, at * 4 (citing *Southwestern Bell*, 208 F.3d at 482). The Tenth Circuit itself took the same approach. *Id.* Nothing in the Seventh Circuit's decision in this case would preclude reliance on supplemental jurisdiction to reach state law claims in appropriate cases.

To the contrary, while the Seventh Circuit did seem to contemplate that in the usual case federal issues would be litigated in federal court and state issues would be litigated in state court, Am. Pet. App. 17a, it did not discuss supplemental jurisdiction. Nor was there any reason to do so, since Ameritech never invoked the court's supplemental jurisdiction – insisting instead that it was presenting only federal claims cognizable under section 252(e)(6).

Moreover, the Seventh Circuit's conception of how review would usually proceed was obviously influenced by a factor not present in the Fifth and Tenth Circuit cases – an assertion of Eleventh Amendment immunity by the defendant state commission. While state commissions do not have Eleventh Amendment immunity from federal claims brought under section 252(e)(6), *see* pp. 24-29 *infra*, they still may invoke Eleventh Amendment immunity as to state law claims. As to the latter, the *Ex parte Young* doctrine does not apply, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984), and the argument for a finding of waiver of

immunity is also much more problematic.[3] Given these realities, in a case where a state chooses to assert its immunity, it is very likely that state claims will have to be brought in state court, as the Seventh Circuit noted. But the Seventh Circuit's acceptance of this forced bifurcation of the case does not conflict with anything in the Fifth or Tenth Circuit decisions. Nor should it be a surprise to this Court, which recognized in *Pennhurst* that bifurcation of a case involving both state and federal issues may be a necessary consequence of the Eleventh Amendment. *Id.* at 121-23.

In another attempt to manufacture a circuit conflict, Ameritech contends that the Eighth and Fourth Circuits and the FCC also have reached conclusions that diverge from the Seventh Circuit's analysis. *See* Am. Pet. at 13-23. These arguments are equally unavailing.

The Eighth Circuit in *Southwestern Bell Telephone Co. v. Connect Communications Corp.* simply held that Southwestern Bell's claim that a state commission determination "violated federal law" was sufficient to confer subject matter jurisdiction to consider "that claim on the merits." 225 F.3d at 948. The Eighth Circuit determined that the claims in that case raised a number of federal issues over which the court could assert jurisdiction. *Id.* But the Eighth Circuit did not agree with Ameritech that interpretation of an interconnection agreement is an inherently federal question, nor did it dispute the other

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[3] The clear and unequivocal notice to states that their actions will be subject to federal court review under section 252(e)(6) does not appear to extend to state law issues, because that section only refers to actions in federal court to determine whether the state commission's determination "meets the requirements" of sections 251 and 252. A lack of clear notice would preclude a finding of waiver of immunity as to state law issues. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985).

courts' view of the role of state law in this area. Rather, the Eighth Circuit agreed that federal courts are to ensure only "compliance with federal law" and "[w]ith regard to purely state law issues, the state commissions may have the final say." *Id.*

The Fourth Circuit's decision in *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 229 F.3d 457 (4th Cir. 2000), likewise fails to provide grounds for certiorari. That case was factually distinct from this one in that it did not involve a challenge to a state commission decision interpreting or enforcing an interconnection agreement. Rather, it was a challenge at the approval stage. Further, the court did not purport to examine the appropriate scope of review under section 252(e)(6). Instead, it relied on the "inherent power of the court" to order a district court to consider reforming a negotiated interconnection agreement provision that was intimately related to an arbitrated provision after FCC and court decisions established the invalidity of that arbitrated provision. *Id.* at 466 n.4. The court cited equitable considerations for its actions: the provision at issue was negotiated at a time when applicable federal regulations specifically required such a provision, but those regulations were later invalidated, and *an arbitrated* provision intimately related to the negotiated provision at issue had been invalidated based on a separate change in federal law. *Id.* at 464-65; *see also AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 661, 670 & n.4 (E.D.N.C. 1998). None of those considerations

apply here. The Fourth Circuit did not even consider – much less disagree with – the Seventh Circuit's decision.[4]

Ameritech's reliance on the FCC's decision in *In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 F.C.C.R. 11227 (2000) ("*Starpower*"), is also misplaced. Ameritech claims that the FCC determined in *Starpower* that "any regulatory determination under section 252, whether by a state commission or by the FCC, interpreting an interconnection agreement presents a question of federal law that is reviewable in federal court." Am. Pet. 20. But the FCC in *Starpower* found that if state commissions refuse to interpret and enforce interconnection agreements, the FCC would undertake that duty pursuant to section 252(e)(5). *Starpower* says *nothing* about judicial review of state commission determinations or the law that governs interpretation of interconnection agreements. The order's only sentence regarding judicial review concerns review of *FCC* proceedings, and provides that "findings made by the [FCC] . . . and any judicial review of such findings shall be the exclusive remedies available to the parties." *Starpower* ¶ 9. That is a simple restatement of part of section 252(e)(6) that provides for review of FCC decisions, which must be in the Hobbs Act court. 47 U.S.C. § 252(e)(6). An *entirely separate* portion of section 252(e)(6) governs state commission review, and that is the provision at issue in this case. *Id.* Further, that the FCC is considering the contract issues in *Starpower* does not federalize them. Federal agencies routinely apply state law, subject to federal court review. *See, e.g., Nicor Exploration Co. v. FERC*,

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[4] As noted *infra*, the Fourth Circuit currently has under advisement two cases that much more closely resemble the instant case.

50 F.3d 1341, 1347-49 (5th Cir. 1995). While review of state commission decisions is limited to ensuring that any determination "meets the requirements of [s]ections 251 and [252]," that limitation does not apply to review of FCC decisions. 47 U.S.C. § 252(e)(6).

C. The circuits agree that state commission defendants are not immune from section 252(e)(6) actions under the Eleventh Amendment.

As for the Eleventh Amendment issues raised by the ICC, there is again no circuit conflict. Three circuits, including the Seventh, now have held that a case like this one is a "straightforward *Ex parte Young* case" that may be brought in federal court against the members of a state commission. *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000); *see MCI-II*, *supra*; *MCI Telecommunication Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939-40 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-593).[5] This prevailing consensus is reflected in the fact that the

[5] In addition, the vast majority of district courts – over two dozen – that have ruled on this question have found that the Eleventh Amendment is not a bar to an *Ex parte Young* action commenced pursuant to section 252(e)(6). *See, e.g., Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. Serna*, No. Civ 97-124, 1998 U.S. Dist. LEXIS 23024 (D.N.M. Mar. 31, 1998); *AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 60 F. Supp. 2d. 1279 (N.D. Fla. 1997); *GTE Fla., Inc. v. Clark*, 60 F. Supp. 2d 1277 (N.D. Fla. 1997); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998).

Court has twice denied review on this very question during this Term.[6]

The ICC claims that there is a circuit conflict as to one of the alternate bases for rejecting the Eleventh Amendment defense that the Seventh Circuit has also embraced – waiver. But here again, the Tenth Circuit – the only other court of appeals to have addressed the question – is in full agreement with the Seventh Circuit. *See MCI Telecommunications Corp.*, 216 F.3d at 938.[7] The ICC cites *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 380 (2000), as supporting its position on waiver. ICC Pet. at 20. But the only reference to waiver of Eleventh Amendment immunity in that case is pure dicta in a footnote. 209 F.3d 922, n.6. The state commission, as a corporate entity, was not even a defendant in the case and the Sixth Circuit did not reach waiver because *Ex parte Young* applied.

[6] *See Strand v. Michigan Bell Tel.*, 121 S. Ct. 54 (2000); *Strand v. Verizon North, Inc.*, 121 S. Ct. 380 (2000).

[7] As with *Ex parte Young*, the vast majority of district courts that have ruled on the waiver question have held that states voluntarily waive their sovereign immunity when they willfully participate in the Act's regulatory scheme. *See, e.g., Michigan Bell Tel. Co. v. Climax Tel. Co.*, 2000 U.S. Dist. LEXIS 15195 (W.D. Mich. Oct. 12, 2000); *GTE California, Inc. v. California Telecommunications Coalition*, Nos. C 99-03973 CW *et al.*, slip op. at 28-35 (N.D. Cal. Aug. 31, 2000); *Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc., 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998).

II. The Issues Presented by the Petitions Are Still Developing in Other Circuits, the FCC, and Congress.

The Court should not grant review for the additional reason that the issues petitioners raise are pending and soon to be addressed in several additional circuits. Further, the FCC and Congress may act soon on issues pertaining to reciprocal compensation and those actions may severely limit the importance of any decision this Court might issue. It therefore makes sense for the Court to stay its hand at this time.

Cases closely resembling the Seventh Circuit's ruling at issue here are pending in the Fourth, Sixth, and Eleventh Circuits. *See BellSouth Telecommunications, Inc. v. North Carolina Utils. Comm'n*, No. 99-1845(L) (4th Cir.); *Bell Atlantic-Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, No. 99-2459 (4th Cir.); *Michigan Bell Tel. Co. v. MFS Intelenet*, No. 99-1996 (6th Cir.); *BellSouth Telecommunications, Inc. v. WorldCom Techs.*, Nos. 00-12809 (11th Cir.); *BellSouth Telecommunications, Inc. v. ITC DeltaCom*, No. 99-14728 (11th Cir.). Similar cases are pending in district courts within the First, Eighth and Ninth Circuits.

Especially given the absence of a circuit conflict, there is every reason to allow the questions presented here to be addressed in the first instance by these other circuits. Doing so would allow the relevant arguments and considerations to be further elaborated, and if no significant disagreement among the circuits emerges, there may never be need for this Court to undertake a review.

In addition, at the heart of Ameritech's claims is its assertion that federal law does not affirmatively require

reciprocal compensation for calls to ISPs. While the Carriers submit that this question is irrelevant, impending action by the FCC may moot Ameritech's claims altogether. The FCC is currently addressing whether the Act requires reciprocal compensation for calls to ISPs in remand proceedings resulting from *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). There, the D.C. Circuit vacated for want of reasoned decision making a prior FCC order concluding that the Act does not mandate reciprocal compensation for calls to ISPs. *Id.* at 3, 9. Should the FCC conclude that the Act does mandate this compensation, as the D.C. Circuit strongly suggested, Ameritech's claims would be moot. At a minimum, it makes little sense for this Court to grant review before the FCC and the D.C. Circuit have settled on the federal rule regarding reciprocal compensation for calls to ISPs.[8]

Finally, Ameritech's claim of urgency is unfounded. *See* Am. Pet. at 28-30. Ameritech will suffer no prejudice should the Court agree that this issue should work its way through the courts before granting certiorari. At the same time as it instituted this case in 1998, Ameritech separately filed a state court appeal in Illinois to challenge the ICC's order. *See* note 1 *supra*. That case has been stayed pending resolution of Ameritech's petition and will be returned to active status upon close of these federal proceedings. Thus, should this Court deny Ameritech's petition, proceedings in that state court action will commence and Ameritech will have a full opportunity to

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[8] Moreover, legislation proposed at the end of the last session would have addressed the question whether federal law should mandate or prohibit reciprocal compensation for calls to ISPs. *See* Reciprocal Compensation Adjustment Act of 2000, H.R. 4445, 106th Cong. (2000); Stephen Labaton, *Communications Lobby Puts Full-Court Press on Congress*, N.Y. Times, Oct. 24, 2000, at A1. This Court should not enter the fray when legislative initiatives are impending.

voice again any state law claim that the ICC misinterpreted the contracts.

III. The Seventh Circuit's Decision Is Correct.

Petitioners' arguments for review are also unpersuasive because the Seventh Circuit's ruling is correct.

A. Section 252(e)(6) applies to review of state commission "enforcement" determinations.

The Seventh Circuit did not err in holding that section 252(e)(6) provides federal jurisdiction to review a state commission order interpreting and enforcing an existing interconnection agreement. That provision states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [sections 251 and 252 of the Act.]

47 U.S.C. § 252(e)(6). As four circuits have recognized, *see* p. 8 *supra*, it would make no sense to read this language as applying only to commission orders approving or rejecting interconnection agreements. To the contrary, when read in context and in light of the Act's structure and purpose, section 252(e)(6) is properly understood as providing that "[i]n any case in which a State commission makes a determination" about the meaning of an existing (*i.e.*, previously approved) interconnection agreement, a "party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement," as now

construed by the commission, "meets the requirements of section 251 [and 252]." 47 U.S.C. § 252(e)(6).

In attempting to ascertain legislative intent, courts do not "look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law." *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856) (internal quotation marks omitted)). Here, that means that section 252(e)(6) should be read in light of Congress's creation of a "new federal regime" that "fundamentally restructures local telephone markets." *AT&T Corp.*, 525 U.S. at 371, 378 n.6. This jurisdictional provision is an essential component of the new federal regime because it assures that state commission compliance with the Act will be assessed by federal courts, which can elaborate a uniform federal interpretation. As this Court has emphasized in discussing the Act: "The appeals . . . to what might loosely be called 'States' rights' are most peculiar, since there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.* at 378 n.6.

It would have been particularly anomalous for Congress to have provided that federal courts have *exclusive* jurisdiction to review state commission orders approving interconnection agreements, while simultaneously not intending that federal courts entertain challenges to enforcement orders as violative of the Act. The ICC argues that the phrase "under this section" limits section 252(e)(6) to *approval* determinations, because those are the only determinations a commission makes "under" section 252. ICC Pet. at 12. But the ICC expressly invoked jurisdiction under the 1996 Act in adjudicating this dispute. Am. Pet. App. 77a, 84a. Thus, approval and later

enforcement/interpretation determinations are, in every practical sense, made "under" section 252, which is the key provision authorizing state commissions to play a role in this field.

In any event, this debate is largely academic. Even if the Court were to disagree with the circuit courts and interpret section 252(e)(6) not to confer jurisdiction on federal courts, then jurisdiction under 28 U.S.C. § 1331, in combination with 42 U.S.C. § 1983, would authorize parties to bring to federal court claims that state commission enforcement decisions had violated federal law. *See Strand*, 209 F.3d at 915-19; *Puerto Rico Tel. Co.*, 189 F.3d at 16; *see also City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156, 166-68 (1997) (recognizing that there is federal jurisdiction to review state administrative agency decisions where the party formulates an appropriate federal claim).

B. Section 252(e)(6) does not authorize review of state law claims.

The Seventh Circuit similarly was correct in concluding that section 252(e)(6) provides solely for review of federal claims. The statute's plain language compels that conclusion. Section 252(e)(6) authorizes a federal court to assess only whether a state commission's determination "meets the requirements of section 251 . . . and this section [252]" of the 1996 Act. 47 U.S.C. § 252(e)(6). As the First Circuit explained, "[i]f Congress intended federal courts' review to encompass any kind of alleged flaw in a state commission's determination, then there would have been little need to include the language 'meets the requirements of section 251 and . . . [section 252].'" *Puerto Rico Tel. Co.*, 189 F.3d at 14.

Ameritech insists that the bifurcated system resulting from the Seventh Circuit's view of section 252(e)(6) "make[s] no sense" because Congress should have "requir[ed] at least as much federal oversight" of state commission decisions as FCC decisions in order to "secure national uniformity". Am. Pet. 21-22. But section 252(e)(6) *does* provide federal court review for all questions of federal law arising from the determinations of state commissions and the FCC. For questions of state law contract interpretation, Ameritech's uniformity concern does not apply. Moreover, as noted above, this Court recognized in *Pennhurst* that the need to accommodate both federal and state interests could lead to bifurcated systems of review. 465 U.S. at 121-23.

Finally, Ameritech raises the specter of "grave Article III concerns." Am. Pet. at 16. It argues that if its state law challenge to the ICC's contract interpretation is successful, the Seventh Circuit's previous analysis of whether the ICC's determination violates federal law would be moot. But under section 252(e)(6), the test is whether the *state commission's* determination violated federal law, as the Seventh Circuit recognized. The answer to that question depends on the state commission's ruling, not hypothetical subsequent state court proceedings.

C. The Seventh Circuit correctly denied Ameritech's challenge to the ICC's orders.

The Seventh Circuit also was correct in rejecting Ameritech's argument that the ICC's alleged misinterpretation of the interconnection agreements as requiring reciprocal compensation for ISP calls was itself a violation of *federal* law. Ameritech raises two basic arguments in its attempt to federalize a breach of contract claim. First, it argues that

because interconnection agreements are required by the Act, and the Act imposes minimum requirements that apply unless the parties agree otherwise, the interpretation and enforcement of the agreements is inherently a federal issue.

This argument fails under the well-established rule that merely because Congress requires a contract by statute does not mean that every question regarding the interpretation of such a contract is a question of federal law. *Jackson Transit Auth.*, 457 U.S. at 22-23. The interpretation of contractual terms raises a question of federal law *only* if the provision at issue demonstrates that Congress plainly intended that "the rights and duties contained in [such a] contract [are] federal in nature." *Id.* at 23.

Ameritech's theory ignores *Jackson* and would require federal courts to fashion a federal common law of interconnection agreement interpretation. But federal courts may not create federal common law except in the most "narrow areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Only in a "few and restricted" cases, "where there is a significant conflict between some federal policy or interest and the use of state law" should a court contemplate creating federal common law. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (internal quotations and citations omitted). Even when dealing with a comprehensive federal statutory scheme, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85.

Nothing in the 1996 Act suggests that Congress intended to transform every question regarding the meaning of an interconnection agreement term into a federal question. To the contrary, Congress expressly provided that "this Act . . . shall

not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, Title V, § 601(c), 110 Stat. 43. Congress also expressly authorized states to impose in interconnection agreements pro-competitive state-law requirements that are consistent with the Act. 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c). Obviously, Congress did not intend to preempt all state law.

Second, Ameritech argues that interconnection agreements are not "agreements" at all, but instead constitute "regulatory vehicles" that merely incorporate federal law requirements. Am Pet. at 23. If this were so, however, there would be no need for these elaborate interconnection agreements at all. Congress could have simply provided that incumbents must comply with the minimum requirements of federal law. As the Seventh and Fifth Circuits have recognized, it did not do so. "The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out." Am. Pet. App. 12a (quoted in *Southwestern Bell*, 208 F.3d at 484-85).

Moreover, as Ameritech acknowledges, the Act itself provides that parties may "enter into a binding agreement . . . *without regard to the standards* set forth in" the Act. 47 U.S.C. § 252(a)(1) (emphasis added). Had Congress intended negotiated agreements to be governed exclusively by federal law, it would not have allowed parties to enter into them "without regard" to the Act's requirements.

In any event, even if the contract interpretation issue could be reached in this federal action, the ICC correctly interpreted the agreements' terms to require reciprocal compensation for calls to ISPs. Am. Pet. App. 10a-15a. Considered in light of

the custom and practice of the telecommunications industry, the agreements' terms demonstrate that Ameritech agreed to pay reciprocal compensation for calls to ISPs. *Id.* The ICC even applied factors that directly parallel those that the FCC suggested state commissions may consider when determining whether parties agreed to pay reciprocal compensation for calls to ISPs. *Id.* at 14a; *see In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP Bound Traffic*, 14 F.C.C.R. 3689, ¶ 24 (1999); *Starpower* ¶ 9. The ICC's decision is consistent with the decisions of four circuit courts, six federal district courts and over thirty state commissions. No court has held to the contrary.

D. The ICC does not have Eleventh Amendment immunity as to Ameritech's federal claims.

The Seventh Circuit's holding that the ICC defendants are not immune from a federal suit brought pursuant to section 252(e)(6) is firmly grounded in this Court's Eleventh Amendment jurisprudence. Consistent with *Ex parte Young*, the Act permits aggrieved parties to seek review of state commission determinations in federal court. The Act erects no limits on the equitable powers that federal courts have at their disposal to ensure that the state commissioners' actions comply with the Act's requirements. Moreover, in the spirit of cooperative federalism, Congress intended to encourage the participation of states in the regulation of interconnection matters addressed in the Act. Accordingly, the Act subjects any determination regarding interconnection agreements made by a state commission to review in federal court for compliance with federal law. Illinois' decision to accept Congress' invitation to regulate pursuant to the Act – a responsibility it

does not have to assume – constitutes a waiver of its Eleventh Amendment immunity within the meaning of *College Savings*.

1. *Ex parte Young* applies here.

This Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the *Ex parte Young* rule, a lawsuit in federal court against state officials seeking prospective relief from ongoing violations of federal law is not treated as implicating a state's immunity under the Eleventh Amendment. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 294 (1997) (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

Although the ICC argues otherwise, ICC Pet. at 28-29, these requirements are plainly satisfied here. As the Seventh Circuit put it in *MCI-II*, the "challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. . . . Such relief is precisely the type contemplated by the *Ex parte Young* doctrine." 222 F.3d at 345.

The ICC petitioners also argue that *Ex parte Young* applies *only* in constitutional cases. ICC Pet. at 24-28. But that argument completely misapprehends the *Ex parte Young* doctrine and this Court's holdings. *See, e.g. Coeur d'Alene*, 521 U.S. at 270 (*Ex parte Young* actions exist "to ensure the supremacy of federal statutory and constitutional law"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-74 (1996) (reaffirming that a proper *Ex parte Young* suit is one that seeks to challenge the "continuing violation of federal law"); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (barring suit in statutory case only to the extent plaintiffs sought

retrospective relief). The Court has never limited the doctrine in the manner petitioners imagine. Indeed, the Court has repeated that the *Ex parte Young* doctrine is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp.*, 465 U.S. at 105 (quoting *Ex parte Young*, 209 U.S. at 160).

Finally, the ICC petitioners attempt to rely on *Seminole Tribe*, where the Court held that the inclusion of an express and very limited set of judicial remedies in a statute impliedly precluded reliance on *Ex parte Young*. ICC Pet. at 21-24. But there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the requirements of section[s] 251" and 252. 47 U.S.C. § 252(e)(6). That section raises none of the concerns presented in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court held that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part. *Id.* at 75. For example, although the IGRA authorized federal courts to order a state to negotiate in good faith, it barred enforcement of those orders through contempt sanctions. *Id.* at 74-75. Thus, the *Seminole Tribe* Court saw a clear inconsistency between the limited remedies available under IGRA and an *Ex parte Young* action, where the typical remedy is an enforceable injunction.

There is nothing in section 252 that would limit federal court review in a remotely comparable manner. In fact, allowing *Ex parte Young* suits to proceed pursuant to section 252(e) realizes Congress's intent to allow federal courts to address ongoing violations of federal law by state officials. Unlike the IGRA, for example, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).[9]

In sum, it is hard to imagine a statutory remedy more synonymous with *Ex parte Young* than that provided by Congress here. Certainly the fact that the statute refers

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[9] *Seminole Tribe* also held that IGRA specifically requires that "the state" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the state" for purposes of carrying out its duties under IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, nothing in the Act requires that actions be brought against "the state." Section 252 does not specify who must be a party in federal court, but simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended such suits to be brought on that basis. Moreover, the term "state commission" is defined in the Act to include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. 47 U.S.C. § 153(41). Contrary to petitioners' claims, *see* ICC Pet. at 22-23, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.

expressly to a federal cause of action cannot, without more, preclude reliance on *Ex parte Young*. That would flout, rather than vindicate, the intent of Congress.

2. A state's waiver of immunity obtained through its voluntary participation in the Act's regulatory scheme is consistent with *College Savings*.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court recognized that Eleventh Amendment immunity may be waived, but it emphasized that such a waiver must be clear and voluntary. 527 U.S. 666, 679 (1999); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). The Court's particular concern was a form of "constructive waiver" that is effectively indistinguishable from abrogation – *i.e.*, where Congress simply "deems" some ongoing state conduct to be a waiver. 527 U.S. at 681-83 (discussing *Parden v. Terminal Ry. Co. of Ala. State Docks Dept.*, 377 U.S. 184 (1964)). To allay that concern, the Court held that a federal law requiring states to waive immunity in order to be allowed to continue engaging in some "otherwise lawful activity" does not lead to a clear and voluntary waiver. *Id.* at 687 ("[W]e think . . . the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.")

But the Court did not bar all waivers effected through voluntary conduct. To the contrary, it stated that states do validly waive immunity when they knowingly accept a

gratuitous federal benefit expressly tied to a waiver. The Court illustrated this point by distinguishing two important cases in which statutory conditions placed on states by Congress were upheld although waiver was not formally declared by the states. *Id.* at 686-87. The Court recognized that *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), "held that a bistate commission which had been created pursuant to an interstate compact (and which [it] assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact." 527 U.S. at 686. It also noted that *South Dakota v. Dole*, 483 U.S. 203 (1987), held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. The *College Savings* Court explained that, pursuant to the Article I provisions at play in *Petty* and *Dole*, Congress was under no "obligation" to give states the "gratuity" or "gift" obtained, *id.* at 686-87, and that the states, in those cases, were not coerced into waiving their Eleventh Amendment immunity in order to engage in "otherwise lawful activity." The cases thus illustrated how valid waivers could occur through acceptance of conditional benefits. *Id.* at 687.

These principles were appropriately applied by the Seventh Circuit here, where Congress created a set of federal standards and procedures applicable to local interconnection of competing carriers, and then offered states the "gratuitous" opportunity to participate in the new federal scheme, conditioned on the quite reasonable requirement that the state commissions' actions be reviewable for compliance with federal law in federal court. Thus, even if *Ex parte Young* were not available as a vehicle to allow federal court review of state

commission actions, the Eleventh Amendment would not apply because it is waived when states choose to participate in the review and enforcement of interconnection agreements.

CONCLUSION

For the reasons set forth above, both petitions should be denied.

Respectfully submitted,

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